

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
MICHAEL J. AND JODY S. MOROSO)

Appearances:

For Appellants: Michael J. Moroso, in pro. per;

For Respondent: Kendall E. Kinyon
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code^{1/} from the action of the Franchise Tax Board on the protest of Michael J. and Jody S. Moroso against a proposed assessment of additional personal income tax in the amount of \$1,002.29 for the year 1976. After the hearing on this appeal, respondent conceded that the proposed assessment should be in the reduced amount of \$864.00.

^{1/} Unless otherwise indicated, all references are to provisions of that code.

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The issue presented is whether income received from a qualified employees' deferred compensation plan upon termination of employment, which was promptly transferred to an individual retirement account, constituted taxable income.

Appellant Michael J. Moroso was a participant in the McDonnell Douglas Corporation ("MDC") salaried employees' savings plan prior to termination of his employment with that company in 1976. The employees' savings plan is a qualified employees' trust as described in section 17501, and consequently, the trust is exempt from the state personal income tax pursuant to section 17631.

Upon his separation from employment, appellant received a lump-sum distribution from the trust of a total value of \$37,593.85. The distribution was received in 1976, in two parts; first, a cash distribution of \$16,695.85, and, later, 1,161 shares of MDC stock with a value when distributed of \$20,898.00. Appellant had contributed \$18,187.00 to the employees' trust and, therefore, his net gain from the entire distribution amounted to \$19,406.85.

Upon receipt of the \$16,695.85 cash payment, appellant immediately transferred it to a qualifying individual retirement account (IRA), as defined in section 17530, which he established with the California Federal Savings and Loan Association (CFSLA). When appellant subsequently received the MDC stock he also immediately attempted to transfer it to the IRA. However, the CFSLA then refused to accept such property. In November of 1978 appellant also transferred \$2,711.00 in cash to the IRA. This amount, when added to the previous transfer of \$16,696 in 1976, reflected an ultimate "rollover" of the entire net income from the MDC trust distribution to the IRA.

On their joint state personal income tax return for the year 1976, appellants reported the distribution from the MDC savings plan, but concluded that the \$16,696.00 "rollover" to the IRA resulted in an exclusion under the law of that amount of the \$19,407.00 net income from **taxability**. Respondent disallowed the exclusion, determining under the then applicable California law, that both parts of the distribution had to be "rolled-over" on or before

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the 60th day of their receipt before any "rollover" exclusion could be permitted. 2/

Section 17503 provides, in general, that distributions from a qualified trust, in excess of the employee's contributions, are taxable to the employee in the year of receipt. During 1976, subdivision (e) of section 17503 (relettered to (d) by Stats. 1977, ch. 1079, p. 3357) did provide an exclusion from taxation for the income from a lump-sum distribution where there was a "rollover" to an IRA which satisfied the conditions set forth in that subdivision. In 1976, however, that subdivision provided,, as one of the conditions to **excluding** the otherwise taxable portion of such a distribution, that the employee transfer all of the property received in such distribution to an IRA on or before the 60th day after the day on which such property is received. Notwithstanding that it was the action of the CFSLA which contributed to the lack of compliance with that essential condition, appellant simply did not meet that requirement. (Cf. Appeal of Edward and Anne J. Rittenhouse, Cal. St. Bd. of Equal., May 4, 1978.) Thus, the partial "rollover" did not result in the exclusion urged by appellant.

Appellant relies on the consideration that under **federal** law (Int. Rev. Code of 1954, § 402(a) (5)) the partial "rollover" in 1976 qualified for exclusion. While that federal provision was not amended until 1978 to allow an exclusion for partial "rollovers", the amendment was nevertheless expressly made retroactive to taxable years beginning after December 31, 1974. (Pub. L. No. 95-458 (1978).) 3/

2/ Subsequent to the hearing on this appeal, respondent agreed with appellants' view that, in the event the entire net gain from the distribution was determined taxable, the special seven-year income averaging provisions set forth in section 17112.7 were applicable. It is for this reason respondent concedes that its assessment should be reduced to the amount of \$864.00.

3/ Moreover, pursuant to an additional amendment contained in Public Law No. 95-458, appellant was entitled to exclude the entire net income from taxability under federal law by transferring \$2,711 (reflecting the balance of its net income not previously transferred) to the IRA in 1978.

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In 1979, subdivision (d) of section 17503 was amended by the California Legislature to provide for an exclusion of a qualifying distribution to the extent of a timely partial "rollover". (Stats. 1979, ch. 1168, No. 8 West's Cal. Legis. Service, pp. 4703-4704, enacted Sept. 29, 1979.) Pursuant to the language of that amendment, if it had been operative for the year 1976, appellant would be entitled to the exclusion sought in this appeal. However, section 119 of chapter 1168 provides:

This act provides for a tax levy within the meaning of Article IV of the Constitution and shall go into immediate effect. However, the provisions of this act shall be applied in the computation of taxes for taxable years beginning on or after the first day of the calendar year in which this act becomes effective provided the effective date is more than 90 days prior to the last day of the calendar year. If the effective date is 90 days or less prior to the last day of the calendar year, the provisions of this act shall apply in the computation of taxes for taxable years beginning on or after the first day of the calendar year following the effective date. (Emphasis, added.)

Therefore, unlike the federal amendment, the state provision allowing an exclusion because of partial "rollovers", was not operative for taxable years beginning prior to January 1, 1979.

Appellant also makes certain equitable arguments in urging that the partial "rollover" should result in the exclusion claimed. However, we are bound to resolve this appeal on the basis of the state law applicable during the year 1976. Consequently, we must sustain respondent's position.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Michael J. and Jody S. Moroso against a proposed assessment of additional personal income tax in the amount of \$1,002.29 for the year 1976, be and the same is hereby modified in accordance with the concession made by respondent. In all other respects, the action of the respondent is sustained.

Done at Sacramento, California, this 4th day of March , 1980, by the State Board of Equalization.

Richard H. Hays, Chairman
Ernest Stromburg, Member
Adelbert L. B. B. B., Member
Geoffrey Kelly, Member
_____, Member